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Before the
**FEDERAL COMMUNICATIONS COMMISSION**
Washington, D.C. 20554

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| In the Matter of | ) | |
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| Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation | ) | MM Docket No. 93-215 |
| | ) | |
| and | ) | |
| | ) | |
| Adoption of a Uniform Accounting System for Provision of Regulated Cable Service | ) | CS Docket No. 94-28 |

To: The Commission

**PETITION FOR RECONSIDERATION**

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## SUMMARY

The Commission should reconsider its cost of service rules in several respects. In particular, the Commission should eliminate burdensome procedural and substantive aspects of its hardship rules and should permit cable operators to recover and earn a return on their investments in intangible assets. The current rules, which create particular difficulties for "pure" cable operators like Cablevision Industries, will harm consumers as much as the cable industry.

First, the Commission should modify its hardship rules. The current procedural requirements are the equivalent of a regulatory shell game, forcing a cable operator to guess where to turn next, and should be changed to a one-step process to give cable operators a fair chance to make a hardship showing. Substantive requirements should be changed as well. The Commission should exclude revenues from unregulated services and businesses from its hardship consideration, as is the case with the telephone industry. The rules should permit cable operators to make hardship showings at the franchise level, as is required by the 1992 Cable Act's rate regulation provisions. Finally, the Commission cannot consider "competitive" rate levels in evaluating hardship showings.

The Commission also should correct its failure to recognize investments in intangible assets. Transition rules that permit cable operators to recover and obtain a fair return on their intangible assets are necessary to prevent devastating financial effects that will hurt consumers through reduced service and, eventually, the loss of service as cable operators go out of business. The necessity for transition rules of this sort has long been recognized by the courts as well. In addition, the 1992 Cable Act does not give the Commission the authority to retroactively disallow investments that were made before the Act was adopted.

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**PETITION FOR RECONSIDERATION**

Cablevision Industries, Inc. ("CVI") hereby petition for reconsideration of certain aspects of the Commission's *Report and Order* in the above-referenced proceeding.[1/] As shown below, the Commission should modify its rules in two key areas: hardship showings and recognition of intangible assets in cost of service showings. The current rules impose insupportable burdens on the growing number of cable operators that cannot operate under the Commission's stringent benchmark system. These rules must be modified if the Commission hopes to meet the longstanding judicial standards for constitutional rate regulation.

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1/ Implementation of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation and Adoption of a Uniform Accounting System for Provision of Regulated Cable Service, *Report and Order and Further Notice of Proposed Rulemaking*, 9 FCC Rcd ____, MM Docket No. 93-215, CS Docket No. 94-28, rel. Mar. 30, 1994 (the *"Report and Order"*).

## I. Introduction

CVI is a major cable operator serving more than one million subscribers. Unlike many other MSOs, CVI is a "pure" cable operator, without significant interests in programming or other business. As a result, CVI is at greater risk from the Commission's regulation than many other MSOs.

CVI has been an active participant in the Commission's ongoing cable rate regulation proceedings and, as the subject of that regulation, has evaluated the impact of the Commission's decisions on its operations and financial health. This evaluation has led it to conclude that the current hardship rules and the presumptive exclusion of most intangible assets, including additions to capital in the form of accumulated losses from cost of service showings, may make it impossible for it to obtain the investment it needs to maintain its services to cable subscribers, let alone to grow and provide the innovative services that will be demanded in the future. It is important for the Commission to recognize that maintaining high quality services is an important consumer benefit that should not be discarded in a search for rock bottom cable rates.

First, the Commission's hardship rules do not provide a meaningful opportunity for cable operators to obtain relief from confiscatory rates obtained through the benchmark or cost of service processes. The Commission should streamline the hardship showing process and eliminate the pricing constraints imposed by its intent to consider "competitive" rates in evaluating hardship showings. The Commission also should grant cable operators more flexibility in determining the best way to make a hardship showing.

The Commission's treatment of intangible assets also should be reformed. The current rules will result in irreparable harm to cable operators that made investments in intangible assets **prior** to rate regulation. The Commission does not have the authority to deny recovery of those investments. Transition rules that permit cable operators to recover and earn a return on investments in intangible assets while protecting consumers from rate shock are the best way to meet the Commission's statutory and constitutional obligations.

## II. The Commission's Approach to "Hardship" Showings Should Be Modified.

The hardship rules serve, in essence, as a safety net for the Commission's rate regulations. Although the *Report and Order* admits it only implicitly, the Commission apparently expects that the hardship rules will permit it to argue that any Fifth Amendment infirmities of the benchmark and cost-of-service rules are irrelevant because the hardship process remains as a backstop. *See Report and Order* at ¶¶ 292-294. In practice, however, the hardship rules do not suffice because they erect a series of stringent barriers that will prevent cable operators from obtaining the relief they need. This result is both unjust and contrary to settled constitutional law. Thus, the Commission should modify the rules to reduce the burdens of hardship showings and to permit cable operators significantly greater flexibility in determining how such showings should be made.

### A. The Commission May Not Adopt Rules that Unreasonably Burden Cable Operators' Fifth Amendment Rights.

The constitutional requirements for rate regulation are clear: regulated enterprises must be permitted an opportunity to recover, and earn a return on, investment and operating expenses through rates that are within the zone of reasonableness. *See, e.g., Federal Power Comm'n v. Hope Natural Gas Co.,* 320 U.S. 591 (1944); *Washington Gas Light Co. v. Baker,* 188 F.2d 11, 15 (D.C. Cir. 1950), *cert. denied,* 340 U.S. 952 (1981) (*"Washington Gas Light"*). The Commission is not empowered to adopt regulations that unreasonably burden the exercise of this or any other constitutional right. *See Fed Election Com'n v. Nat. Conserv. Pol. Action Comm.,* 470 U.S. 480 (1985) (overturning limitations on independent expenditures by PACs); *Supreme Court of New Hampshire v. Piper,* 470 U.S. 274 (1985) (overturning prohibition on bar admission for non-resident lawyers); *Ake v. Oklahoma,* 470 U.S. 68 (1985) (failure to provide psychiatrist to indigent defendant denies opportunity to exercise due process rights); *Boddie v. Connecticut,* 401 U.S. 371 (1971) (overturning filing fee requirement for indigent parties seeking a divorce). This requirement applies with equal force to both traditional civil rights and the economic rights guaranteed by the Constitution. *See Lucas v. South Carolina Coastal Council,* ___ U.S. ___, 112 S. Ct. 2886 (1992) (taking of land by regulation).

Unfortunately, the Commission's hardship process imposes precisely the kinds of burdens rejected by the courts. It introduces delays and filing requirements that are certain to result in hardship relief coming too late to do any

good, and will consider factors that may not be included in determinations regarding whether regulated rates are compensatory.

### B. The Current Hardship Procedures Unreasonably Burden Cable Operators' Exercise of Their Right to a Reasonable Return.

A regulatory scheme that effectively prevents its subjects from having an opportunity to exercise their constitutional rights is no more valid than one that denies those rights outright. The hardship rules suffer from this precise defect, because they set too many barriers in the way of obtaining hardship relief. Thus, they cannot serve as a backstop for the inadequacies of the other rate regulation options.

The *Report and Order* creates a series of barriers a cable operator must surmount before it can make a successful hardship showing. First, the *Report and Order* expects a cable operator to proceed through the regular regulatory processes before it begins the hardship process. Only after those processes are completed and the operator determines that the rates permitted by those processes "undermine the financial health of the operator so that it is unable to attract capital and maintain credit necessary to operate," can the operator file a hardship showing. *Report and Order* at ¶ 293. But even after making this determination, a cable operator that needs to make a hardship showing must go through a two-step process: the operator must

make an undefined "initial showing" which the Commission must approve before the operator has an "opportunity to prove the facts alleged."[2/]

By the end of this process, any cable operator that "is unable to attract capital and maintain credit necessary to operate" could be bankrupt. Moreover, given that many firms generate operating losses and finance operations with short-term lines of credit, this regulatory-imposed denial of access to capital is likely to be catastrophic. The delays in this process will be particularly pernicious because there is no way for a cable operator to recover the revenues lost during the pendency of a hardship showing. Moreover, consumers will be hurt if these results occur because continuation of high quality service from a good cable operator is a positive benefit that the current rules put at risk.[3/]

In addition, given the Commission's apparent distaste for the entire idea of hardship showings, it is apparent that the likelihood of success is extremely low.[4/]

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2/ *Id.* at ¶ 294. It also is noteworthy that the Commission's parallel hardship provisions under the telephone price cap rules do not require a two-step process. The Commission provides no explanation for placing a heavier burden on cable operators than on local exchange carriers. *See* 47 C.F.R. § 61.49(e).

3/ Deterioration in service is an inevitable result of cash shortfalls that will occur under the drawn out process now contemplated by the rules. Even after a cable system changes hands in bankruptcy proceedings, the likelihood of good service in the future is greatly reduced. It makes no sense to force a cable operator out of business if it is providing good service.

4/ The *Report and Order* states that "it is extremely difficult for us to conceive of [] a situation" justifying a hardship showing arising. *Id.* at ¶ 293. Given such an explicit statement, it should not be surprising to the Commission if outside observers, such as the courts, do not consider hardship showings a realistic option for any cable operator, regardless of the actual effects of the Commission's rate regulation regime

(continued...)

The Commission attempts to lengthen the odds even further by positing that "abbreviated filing option, experimental incentive plan, and average cost approaches" it has adopted or is considering will eliminate the need for hardship showings. *Id.* at ¶ 292. These multiple options are the equivalent of a regulatory shell game — no matter what option a cable operator tries, it is certain to be told that it should have made a different choice.[5/]

If hardship showings are to be a realistic option for cable operators whose businesses are threatened by rate regulation, the Commission must reform the procedures for obtaining this relief. The Commission must shorten the process, in particular by adopting a one-step process for obtaining hardship relief and by eliminating any requirement that a cable operator must exhaust all of its other options before seeking hardship relief. These changes will remedy the constitutional defects

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4/ (...continued)
in a particular case. When a regulatory agency forecloses the opportunity to be heard, the courts are particularly likely to find the agency action unreasonable. *See, e.g., Jersey Cent. Power & Light Co. v. F.E.R.C.*, 810 F.2d 1168 (D.C. Cir. 1987) (en banc) (overturning denial of hearing when regulated utility alleged inadequate return on actual investment) (*"Jersey Central III"*).

5/ Such a sophistry is disfavored by the courts. *See AT&T v. FCC*, 978 F.2d 727 (D.C. Cir 1992). It is noteworthy that the *Jersey Central III* court also rejected an effort by intervenors to make just such an argument. *Jersey Central III*, 810 F.2d at 1182. In addition, some of the "options" are essentially illusory. The abbreviated filing option has no effect on the substantive requirements of the cost of service rules, but simply permits small cable operators to use a shorter form. *Report and Order* at ¶¶ 277-279. The abbreviated filing option at least has the advantage of being part of the Commission's current rules. The average cost approach is merely a proposed rule, not available to cable operators at this time and the experimental incentive plan is interim in nature and almost completely undefined. *Id.* at ¶¶ 303-304 (incentive plan); 330-333 (average schedule). It is difficult to argue that these are realistic options to relieve the substantive burdens of rate regulation.

in the procedures for obtaining hardship relief and will prevent the Commission from bankrupting cable operators whose only crime was having made investments prior to regulation that are not contemplated or accounted for by the Commission's rules.

### C. The Hardship Rules Impose Substantive Requirements that Violate Cable Operators' Rights to a Reasonable Return.

Even if the procedural burdens imposed by the rules could be overcome, the substantive requirements of the hardship rules are contrary to the Commission's statutory and constitutional mandates. First, the absolute requirement that hardship showings be made on the basis of "[t]otal revenues from cable operations, measured at the highest level of the cable operator's cable service organization," will result in the consideration of revenues that are outside the scope of the Commission's regulatory powers. 47 C.F.R. § 76.922(i)(1). This is inconsistent with the Commission's treatment of telephone companies. In the telephone industry, the Commission has recognized that it is improper to set rates for regulated services based on the revenues of unregulated services.[6/]

Moreover, the Commission is empowered to consider only revenues from **regulated** services, as the 1992 Cable Act makes clear. *See* 47 U.S.C. § 543(a)(2) (defining services that are regulated under the Act). By including non-regulated revenues within the scope of the hardship rules, the Commission improperly

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6/ *See, e.g., Computer III* Remand Proceedings: Bell Operating Company Safeguards end Tier 1 Local Exchange Company Safeguards, *Report and Order,* 6 FCC Rcd 7571, 7580 (1991) (separating enhanced services from regulated services for accounting purposes). The Commission's telephone rules contain elaborate procedures to separate regulated and unregulated costs and revenues to avoid contamination in rate determinations. *See, e.g.*, 47 U.S.C. § 64.901.

attempts to sweep them into the ambit of rate regulation.[7/] The Commission should, therefore, modify the hardship rules to eliminate consideration of revenues from unregulated services.

At the same time, the hardship rules also require cable operators to make their hardship showings on an MSO-wide basis. 47 C.F.R. § 76.922(i)(1). This requirement unnecessarily and unfairly limits the showings that a cable operator may make.[8/] For one thing, an MSO with many distinct cable systems is unlikely to have each of its cable systems in precisely the same phase of the regulatory process at any given time, especially given the wide divergences in when franchising authorities seek certification and when cable programming service complaints are filed. Equally important, the effect of requiring MSO-wide showings will be to combine cable systems that are otherwise operated separately for the sole purpose of the hardship showing.[9/]

The MSO-wide approach also raises serious equity issues both for cable operators and for consumers. There is no basis for requiring cable operators to offset

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7/ *See Smith v. Illinois Bell Telephone Co.*, 282 U.S. 133, 148 (1930) (*"Illinois Bell"*) (stating that separation of revenues "is essential to the appropriate recognition of the competent governmental authority in each field of regulation").

8/ In addition, the rules appear to require cable operators to make individual hardship showings at the MSO level to each franchising authority. 47 C.F.R. § 76.922(a). The burden that this requirement would impose on a cable operator is breathtaking. Moreover, the likelihood of inconsistent decisions from franchise area to franchise area is extremely high.

9/ In addition, it is unclear how the Commission will treat systems that are owned by more than one company. Permitting separate showings for individual systems will avoid this issue and other, similar problems.

their losses from systems operated at non-compensatory rates with the profits from other systems operating at permissible but profitable rates. The 1992 Cable Act does not contemplate MSO-wide rate regulation; indeed, all rate regulation is to be carried out at the franchise or system level. *See* 47 U.S.C. § 543. This division of regulation into the constituent parts of the company is consistent with the requirements of *Illinois Bell* and with the Commission's regulation of telephone companies based on study areas. *See, e.g.*, 47 C.F.R. § 36.613. In addition, MSO-wide determinations will harm customers in those markets within the MSO where rates are sufficient to sustain operations because MSOs will be forced to divert resources from those relatively healthy systems to weaker systems, inevitably resulting in lower quality, less reliable service and other effects that will hurt consumers served by "healthy" systems.

The solution to this problem is to permit cable operators to make hardship showings at any appropriate level of the company. In many cases, that will be the system level, but in others it may be appropriate to make a hardship showing at the regional level, the MSO level or in some other fashion, depending on the specific circumstances of the company.

Much as the Commission cannot require cable operators to sweep all of their operations into a hardship showing, it must not permit its approximated calculations of "competitive" rates to contaminate hardship showings. The hardship showing process exists only to account for cases in which the Commission's other regulatory mechanisms do not permit the cable operator to obtain a compensatory rate. In other words, the hardship rules are the Commission's effort to assure that all

cable operators have an opportunity to obtain the **minimum** rates mandated by *Hope* and the other cases requiring rates to be within the zone of reasonableness. Rates just above the confiscatory level form the lower bound of the zone of reasonableness, and the upper bound is defined by rates that exploit consumers. *Hope*, 320 U.S. at 603. By definition, the lower bound of the zone of reasonableness cannot be exploitative of consumers and therefore there is no need to determine whether a rate at the lower bound is reasonable from a consumer's point of view.[10/]

Unfortunately, the *Report and Order* embodies a belief that an operator should demonstrate that the rates that result from a hardship showing will not exceed those charged by systems subject to competition. *Report and Order* at ¶ 293. In effect, the Commission has determined that "competitive" rates will serve as a ceiling for hardship rates, regardless of whether those rates are confiscatory under the *Hope* analysis. This determination renders the hardship process meaningless, because no cable operator will enter the process unless it determines that it cannot survive without rates in excess of those calculated by the Commission's other mechanisms. The Commission cannot restrict hardship showings in this way if it expects its rate rules to pass scrutiny under *Hope*.

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10/ *See Washington Gas Light*, 188 F.2d at, 15 (zone of reasonableness bounded by confiscatory rates at one end and exorbitant rates at the other). This is true for any rate determination mechanism that is intended to satisfy the *Hope* test. Thus, to the extent that the Commission expects the regular cost of service rules to meet the *Hope* requirements, it must exclude consideration of "competitive" rates from cost of service deliberations as well.

## III. The Commission Should Correct Its Failure to Recognize Investments in Intangible Assets.

One of the most serious omissions in the *Report and Order* is the failure of the Commission to recognize investments in intangible assets in the cost-of-service process. Investments in intangible assets represent a significant portion of the assets of many cable operators. Denial of recovery of those assets will have a devastating effect on cable operators, investors and subscribers. Moreover, the Commission does not have the power to engage in the retroactive rulemaking necessary to deem investments made before the 1992 Cable Act invalid. As a result, the Commission should adopt transition rules to permit recovery of and return on investments in intangible assets over a reasonable period of time.

### A. Transition Rules that Permit Recovery of and Return on Pre-regulation Investments in Intangible Assets Are Necessary to Prevent Devastating Effects on Cable Operators and Consumers.

The *Report and Order* dismisses the overwhelming majority of pre-regulation investments in intangible assets as merely "capitalized monopoly profits" and therefore ineligible for recovery under the cost of service rules. *Report and Order* at ¶ 53. This casual regulatory characterization fails to reflect the real costs faced by cable operators. In the absence of transition rules that permit cable operators to recover their actual costs of acquiring systems in the past and operating them today, many cable operators literally will be faced with financial ruin, to the detriment of the cable industry, its investors and consumers.

First, denying recovery of investments in intangible assets will irreparably harm cable operators. Intangible assets such as subscriber lists and the value of a franchise represent as much as three-quarters of the total asset value of some cable systems. If a cable operator is not permitted to recover these investment costs, it simply will be unable to attract future capital because of the inability to return that capital to investors caused by the Commission's Rules.[11/] This is not merely a prospective or abstract issue, because many cable operators obtained debt financing based on their intangible assets and borrow to offset current operating losses. The Commission decision to deny recovery of those assets effectively leaves those cable operators with no way to repay that debt. While the Commission may believe that the prices paid for cable systems between the 1984 and 1992 cable acts reflected "monopoly premiums," there are no facts supporting this view. The fact remains that those prices were actual prices paid for actual cable systems, financed through capital that requires a return. Regulatory fiat can declare those prices

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11/ The difficulty in attracting capital is compounded by the wholly inadequate "interim" 11.25 percent rate of return chose by the Commission. In light of the significantly greater business risks faced by cable operators as compared to telephone companies — risks documented even in the telephone companies' filings and heightened by the disallowance of recovery of intangible assets — there is no justification for a return that is identical to that available to telephone companies. In fact, under the price cap rules, telephone companies now have available to them rates of return that exceed the nominal 11.25 percent return by more than 300 basis points, even considering the Commission's sharing mechanism. The Commission's failure to account for the differences in the relative risks of cable and telephony should be corrected immediately.

unreasonable, but it does not erase the obligations undertaken by the cable operators when they purchased cable systems before the reimposition of rate regulation.[12/]

Operators, such as CVI, that are pure providers of cable service will be particularly damaged by the disallowance of investments in intangibles. Unlike TCI or Time Warner, CVI cannot fall back on revenues from programming or other businesses to support its cable operations. CVI invests its available cash flow back into its cable business, instead of using it to support other businesses. It would be ironic if companies like CVI were unduly penalized by the Commission's decision to disallow the results of such direct investments in providing cable service.

The effects on cable operators will have parallel effects on cable subscribers. Cable subscribers may enjoy lowered rates for some short period, but those rates are likely to come at the cost of worse service, less maintenance and the eventual loss of service in some areas as cable operators go out of business. Again, this is not an abstract claim: absent the ability to obtain sufficient revenue to cover existing capital and operating costs, especially debt service, cable operators will have little choice but to slash their operating costs in whatever ways they can and to go out

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12/ The Commission's presumptive dismissal of intangible assets created by acquisitions ignores the efficiency gains that resulted from system clustering facilitated by acquisitions. Consumers benefit significantly from those efficiencies through improved services and lower rates. CVI also notes that, to the extent operators "overpaid" for systems bought in the post-1984 period, they also "underpaid" for systems bought before the 1984 Cable Act. If intangible assets acquired in the 1980s are disallowed, cable operators should be afforded additional credit for earlier-purchased systems.

of business once their cash runs out.[13/] The result will be that consumers will trade good service for bad service and then no service at all.

As several parties suggested earlier in this proceeding, the Commission can prevent this unreasonable result by adopting transition mechanisms for the recovery of investments in intangible assets. Comcast Cable Communications, Inc. and other commenters suggested a variety of ways the Commission could account for these already-incurred costs, but each of the proposals focuses on the essential goal of recovering and obtaining a reasonable return on intangible assets over a reasonable period of time. *Report and Order* at ¶ 81 & n. 165.

Transition mechanisms should be adopted for several reasons. Principally, a transition mechanism like those discussed in the *Report and Order* will serve to balance the interests of consumers in reasonable rates with the compelling need of cable operators to recover their investments in intangible assets.[14/] At the same time, a transition that allows cable operators to recover their investments in intangible assets will permit cable operators to repay their debt and otherwise

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13/ Because the effects of disallowance of recovery of intangible investments will be so dramatic, the Commission should be especially careful to avoid the irreparable harm such disallowance would cause until the validity of this disallowance is finally adjudicated. For this reason, CVI submits that any rate determination that denies recovery for a substantial amount of intangible assets should be stayed as a matter of course by the Commission pending final judicial review, provided that the cable operator agrees to an accounting order or posts an adequate performance bond. The Commission has ample authority to take such action. *See* 47 C.F.R. §§ 1.100(n), 1.429(k). Absent a stay, cable operators would be irreparable harmed because there would be no practical way to recoup their losses.

14/ *Id.* Amortization of intangible assets over a reasonable period will prevent rate shock that might otherwise harm consumers.

maintain the necessary integrity of their capital structures, so that they can continue to serve consumers well into the future.

The courts have recognized the need for transition mechanisms in the shift from unregulated to regulated status. For instance, when the Commission initiated rate regulation of Comsat, it determined that Comsat should have a capital structure that included 45 percent debt, even though Comsat's existing capital structure was 100 percent equity, and that this capital structure should be imputed to Comsat immediately, without any transition period. The D.C. Circuit, in reviewing that decision, found the flash cut from zero debt to 45 percent debt unreasonable, in large part because Comsat was not on notice of the consequences of its capital structure until the time of the Commission decision. *Communications Satellite Corporation v. F.C.C.*, 611 F.2d 883, 908 (D.C. Cir. 1977) (*"Comsat"*). The parallel to cable is clear: cable operators that acquired systems up until October 1, 1992, or even up to the date the Commission proposed disallowing "excess" costs, were not on notice of the possibility that their intangible assets would be excluded in determining what constitutes a reasonable cable rate. The flash cut elimination of those assets from rate consideration is unfair and contrary to the principles laid out in the *Comsat* decision.

### B. The Commission Does Not Have the Authority to Deny Recovery of and Return on Investments in Intangible Assets Made Prior to the Onset of Rate Regulation.

As described above, there are good reasons to permit cable operators to recover their investments in intangible assets, especially if the Commission expects its

rate regulation rules to provide cable operators with the constitutionally-required opportunity for a reasonable return on investment. At the same time, the Commission also is not empowered to deny recovery of those investments because Congress did not give it the authority to reach back and apply its rules to events that occurred before the passage of the 1992 Cable Act.

It is well-settled that retroactive statutes and rules are disfavored, and that specific authority is required before a regulatory agency can make a retroactive rule. As the Supreme Court explained less than a month ago:

> [T]he presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic. Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted.

*Landgraf v. USI Film Products,* ___ U.S. ___, No. 92-257 (Apr. 26, 1994), slip op. at 20 (*"Landgraf"*). As a consequence, absent specific direction from Congress, typically in the form of legislative language, no statute can have retroactive effect. *Id.* Similarly, administrative agencies, including the Commission, do not have the power to adopt rules with retroactive effect unless that power is granted explicitly by Congress.[15/]

The 1992 Cable Act contains no indication that Congress expected it to be applied retroactively. There is no language in the rate regulation provisions empowering the Commission to inquire into the *bona fides* of already-consummated

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15/ *Bowen v. Georgetown University Hospital,* 488 U.S. 204 (1988) (*"Bowen"*). A similar, though not identical, principle governs the requirement for a transition mechanism for newly regulated entities that is embodied in the *Comsat* case.

transactions, or to determine that pre-existing investments in intangible assets should be disallowed in rate calculations.[16/] Nevertheless, this is exactly what the Commission has done. Cable operators that acted based on the law as it existed when they acquired intangible assets are now expected to relinquish those assets on the basis of the current Commission decision. In the words of the *Landgraf* court, their settled expectations have been disrupted, without any legislative direction authorizing that disruption.[17/] This is precisely parallel to the *Bowen* case, in which the Department of Health and Human Services tried to reach back in time to disallow already-consummated transactions. *Bowen,* 488 U.S. at 207. That effort was unlawful then and the Commission's attempt to disallow investments that predate rate regulation is unlawful today.

Finally, the Commission's characterization of its disallowance of investments in intangible assets as a "presumption" does not save it from the prohibition on retroactivity. *Report and Order* at ¶ 99. A presumption of this nature has a significant substantive effect on the rights of cable operators, an effect that has been recognized in the telephone context by the D.C. Circuit. *See Mountain States*

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16/ There also is no indication of retroactive intent from the legislative history, although the absence of ambiguity in the statute makes reference to the legislative history irrelevant.

17/ Moreover, the specific investments in intangible assets that the Commission presumes invalid are recognized in all other financial contexts affecting cable operators, including generally accepted accounting principles, the Internal Revenue Code and the regulations of the Securities and Exchange Commission. In other words, the expectations of cable operators were particularly reasonable in light of the treatment of investments in intangible assets by all others with an interest in cable operators' accounting financial operations.

*Tel. and Tel. Co. v. F.C.C.*, 939 F.2d 1021, 1026-29 (D.C. Cir. 1991) (denying claim that appeal of adoption of a presumption is not justiciable). The theoretical ability to rebut this presumption does not diminish its substantive effect in rate proceedings.[18/]

## IV. Conclusion

The rules adopted in the *Report and Order* should be modified to conform them to constitutional and statutory requirements. In particular, the Commission should modify the hardship rules to eliminate procedural barriers to obtaining timely hardship relief and to correct substantive flaws that violate the 1992 Cable Act and the requirements of constitutional rate regulation jurisprudence. The Commission also should reverse its decision not to recognize most intangible assets. Failure to recognize these assets will have devastating effects on cable operators and consumers and is a form of prohibited retroactive rulemaking. Rather, the Commission should adopt transition rules to permit cable operators to recover these investments while protecting consumers from rate shock.

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18/ In fact, the *Report and Order* states that the Commission has no intention of allowing recovery of most intangible investments, so the potential for rebutting the presumption is minimal at best. *See, e.g., Report and Order* at ¶¶ 91-92, 97.

For all of these reasons, CVI requests that the Commission reconsider the rules adopted in the *Report and Order* to the extent described herein.

Respectfully submitted,

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